Filed 9/11/12 Martinez v. Antelope Valley Hospital Dist. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANGEL MARTINEZ, a Minor, etc., et al., Plaintiffs and Appellants, v. ANTELOPE VALLEY HOSPITAL DISTRICT, Defendant and Respondent.	B240019 (Los Angeles County Super. Ct. No. MC 022324)

APPEAL from a judgment of the superior court for the County of Los Angeles. Brian C. Yep, Judge. Reversed and remanded.

Nathaniel J. Friedman for Plaintiffs and Appellants.

Davis, Grass, Goldstein, Housouer, Finlay & Brigham and Stacy K. Brigham for Defendant and Respondent.

SUMMARY

The Government Claims Act requires that claims for damages against local public entities be presented to the responsible public entity before a lawsuit is filed; failure to present a claim for personal injury within "six months after the accrual of the cause of action" bars a lawsuit against the public entity. (Gov. Code, §§ 911.2, subd. (a), 905, 945.4.) The question in this case is whether plaintiff Angel Martinez alleged facts sufficient to invoke the delayed discovery rule for accrual of his cause of action for medical negligence, so that his tort claim against defendant Antelope Valley Hospital District, a public entity, may be deemed timely filed for pleading purposes. The trial court ruled that he did not, concluding that plaintiff "failed to meet [his] burden to allege the circumstances surrounding the discovery that Plaintiff's injuries may have been attributed to Defendant and that said discovery was not a failure to investigate or act diligently."

We conclude the trial court erred. On demurrer, the court must accept as true plaintiff's allegation that he could not have discovered facts suggesting his injury was caused by defendant's wrongdoing—in effect, that he did not suspect and should not have suspected his injury was caused by wrongdoing—until he consulted an attorney some 19 months after he suffered injury. Plaintiff's allegations in this case do not permit the court to decide as a matter of law that plaintiff actually suspected or should have suspected wrongdoing earlier.

FACTS

On December 20, 2010, plaintiff, a minor, filed a claim with defendant under the Government Claims Act. His claim stated that the occurrence giving rise to the claim occurred on February 19, 2009—some 22 months earlier—at the Antelope Valley Hospital. Plaintiff, age 7, was "brought from High Desert Medical Group with 'working diagnosis' (i.e., rule out) of meningitis." Plaintiff was admitted to the hospital between noon and 1:00 p.m. on that date, and "[i]t was not until 7:13 p.m. ([m]ore than 6 hours later) that (prophylactic or therapeutic) antibiotics were ordered and then another [half] hour or so elapsed until the antibiotics were administered."

The claim indicated that plaintiff "suffers from brain damage and is non-ambulatory" and "[w]ill incur a lifetime of care costs as well as a lifetime of lost earnings."

On February 3, 2011, defendant wrote to plaintiff stating that his claim was "being returned because it was not presented within six (6) months after the event or occurrence as required by law. . . . Because the claim was not presented within the time allowed by law, no action was taken on the claim." (See Gov. Code, § 911.3, subd. (a).)

On February 8, 2011, plaintiff filed this lawsuit.

Plaintiff's operative third amended complaint (the complaint) alleges the date of plaintiff's injury was February 19, 2009. Plaintiff's father had employed the hospital (and other defendants) "to diagnose, treat and to do all things necessary for [plaintiff's] well-being." The complaint alleges defendants "so negligently examined and cared for [plaintiff] that [plaintiff] was caused to, and did, suffer the damages hereinafter alleged, including, but not limited to, permanent brain damage." In a second cause of action for "willful misconduct" against the defendant doctors (but not against defendant here, the hospital), the complaint alleges that those defendants, "knowing or having reason to know, that brain damage was a 'high likelihood,' proceeded to perform a lumbar puncture without first ordering a CT scan, so as to judge the Plaintiff's brain's ability to withstand the pressures that would be applied to it, during the intended lumbar puncture." "Then, immediately after completion of the lumbar puncture, notwithstanding the aforesaid knowledge, [defendant doctors] took no steps to prevent brain herniation, which, in fact, occurred shortly after performance of the lumbar puncture."

As for when plaintiff's father "suspect[ed] or should [have] suspect[ed] that [plaintiff's] injury was caused by wrongdoing" (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 (*Jolly*)), the complaint alleges: "It was not until Plaintiff's guardian ad litem conferred with the infant Plaintiff's attorney of record, notwithstanding the Guardian ad Litem's continuous attempts to discovery [*sic*] facts as [to] why his child was in the condition in which the infant Plaintiff is, that said Guardian ad Litem

discovered (or could have discovered or should have discovered) for the first time, facts suggesting that defendant Antelope Valley Hospital District, acting by and through its employees, had been negligent in its care and treatment of the minor Plaintiff and that the aforesaid negligence was a proximate cause of infant Plaintiff's injuries and damages . . . ."

Defendant demurred to the complaint on the ground plaintiff failed to comply with the Government Claims Act. Defendant argued that "the only information necessary" (underscore omitted) for plaintiff to have filed a claim was known to plaintiff on February 19, 2009, the day of the alleged injury: "the plaintiff's guardian ad litem knew the essential facts of the injury (i.e., that he had taken his child to the Emergency Department at [Antelope Valley Hospital] and he deteriorated in the Emergency Department requiring an emergent craniotomy); he knew that the person injured was his son; he knew the location of the alleged injury [Antelope Valley Hospital]; and the date of the injury (February 19, 2009)."

Plaintiff opposed the demurrer and, a few days before the hearing, filed two requests for judicial notice of information obtained during discovery. One of these was defendant's answers to interrogatories asking whether the hospital filed a report of an adverse incident in connection with the February 19, 2009 incident and, if not, why not. (Health and Safety Code section 1279.1 requires a health facility to report to state authorities "[a]n adverse event or series of adverse events that cause the death or serious disability of a patient . . . .") (Health & Saf. Code, § 1279.1, subd. (b)(7).) Defendant answered that it did not file a report, because defendant "did not feel events met the criteria for reporting." The second request was for judicial notice of excerpts from the deposition testimony of a neurosurgeon (not a defendant) at Antelope Valley Hospital to the effect that "the patient got wonderful care at Antelope Valley Hospital, but then he needed further care because we did not have that type of care available at that time. And that's why we had to transfer the patient, and that is our customary practice as well." "[C]ustomary practice," the witness explained, meant that "[a]ny patient that comes in with acute pediatric neurosurgical issues, I do operate—and my

colleagues do operate—on them to take care of their acute event, and then get the patient transferred to the tertiary level of care," meaning a university-affiliated hospital. Plaintiff contended that the documents of which he requested judicial notice gave credence to the claim that, as lay people, the parents "had no inkling that there was any negligence until they had met and conferred with counsel."

At the hearing on defendant's demurrer, defendant again argued the essential facts were, "the child was taken to the E.D. [emergency department], had a lumbar puncture, and a couple of hours after the lumbar puncture, he is in emergency craniotomy." Defendant argued these facts were enough to put plaintiff on inquiry notice of his claims against defendant. Defendant argued that plaintiff "can't have it both ways. You can't say that there is no inkling of negligence until we went to our lawyer. [¶] Hello. Why are you at a lawyer, then?" Defendant argued the parents would not have consulted a lawyer if they did not suspect negligence caused the child's injuries.

The trial court took the matter under submission and two weeks later issued a minute order sustaining defendant's demurrer without leave to amend, "for failing to satisfy the [Government] Claims Act. Specifically, Plaintiff failed to meet [his] burden to allege the circumstances surrounding the discovery that Plaintiff's injuries may have been attributed to Defendant and that said discovery was not a failure to investigate or act diligently."

Judgment was entered in defendant's favor and this appeal followed.

DISCUSSION

Plaintiff was required to file a claim with defendant no later than six months after "the accrual of the cause of action." (Gov. Code, § 911.2, subd. (a).) A cause of action accrues for purposes of the claims presentation deadline under the Government Claims Act " 'on the same date a similar action against a nonpublic entity would be deemed to accrue for purposes of applying the relevant statute of limitations.' " (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1242, italics omitted;

Gov. Code, § 901.) In short, the discovery rule for accrual of a cause of action applies to this case as it does to any other case.

The discovery rule provides "that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause." (*Jolly*, *supra*, 44 Cal.3d at p. 1109.) In *Jolly*, the court considered "what constitutes sufficient knowledge to start the statute running." (*Ibid.*) The court's short answer was that the limitations period begins "when the plaintiff suspects, or should suspect, that she has been wronged." (*Id.* at p. 1114.)

Specifically: "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [T]he limitations period begins once the plaintiff ' " 'has notice or information of circumstances to put a reasonable person *on inquiry* . . . .' " ' [Citation.] A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly*, *supra*, 44 Cal.3d at pp. 1110-1111, fn. omitted; see also *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 398 (*Norgart*) [a plaintiff "has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements"].)

So the pertinent question here is whether the complaint demonstrates that plaintiff's father suspected, or should have suspected, that plaintiff's injury was caused by wrongdoing more than six months before he submitted a claim to defendant on December 20, 2010.

Defendant tells us that the cause of action accrued—in effect, that plaintiff's father should have suspected wrongdoing—when the physical injury occurred, on February 19, 2009. We are not persuaded that, as a matter of law, the complaint demonstrates plaintiff's father must have known, or should have suspected, his child

was negligently treated at the defendant hospital before he consulted a lawyer. "[P]hysical injury alone is often insufficient to trigger the statute of limitations." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808, fn. 2 (*Fox*) ["At common law, the term 'injury,' as used in determining the date of accrual of a cause of action, 'means both "a person's physical condition *and* its 'negligent cause.' " ' "].) Under defendant's theory, a plaintiff who comes to an emergency room with a working diagnosis of meningitis, and suffers brain damage during or after an emergency procedure, should immediately suspect the brain damage was caused by wrongdoing. We reject that proposition.

On the other hand, we cannot determine from the facts alleged on what date before he consulted counsel that plaintiff's father had "reason at least to suspect a factual basis" for a medical malpractice claim. The facts alleged do not show that before he consulted counsel, plaintiff's father *actually* "suspect[ed] . . . that [plaintiff's] injury was caused by wrongdoing, that someone ha[d] done something wrong to [plaintiff]" (*Jolly*, *supra*,44 Cal.3d at p. 1110), *or* that plaintiff's father *should have* suspected that plaintiff's injury was caused by wrongdoing sooner than he did. Nothing in the complaint renders implausible the allegation, in effect, that he did not suspect wrongdoing until he talked to an attorney. Since we cannot fix a date or an event based on the facts alleged that shows when he should have suspected wrongdoing before he consulted counsel, we cannot decide as a matter of law that the complaint was untimely.[1]

---

[1] *Fox* tells us that in *Jolly* and *Norgart* (both summary judgment cases), "the court emphasized that the plaintiffs had ample reason to suspect the basis of their claims." (*Fox*, *supra*, 35 Cal.4th at p. 814.) In *Jolly*, the evidence established that as of 1972, the plaintiff "was aware, or at least suspected, that her [medical] condition was a result of her mother's ingestion of [a synthetic drug] during pregnancy," but she did not sue then because her efforts to identify the manufacturer were unsuccessful. (*Jolly*, *supra*, 44 Cal.3d at pp. 1107-1108.) Further, the plaintiff in *Jolly* admitted she wanted to make a claim, thought the drug was defective and she should be compensated, and "suspected that defendants' conduct was wrongful during 1978," well over a year before she filed suit. (*Id.* at p. 1112.) Similarly, in *Norgart*, the

In short, all we know is that plaintiff's father went to a lawyer shortly before presenting his claim and filing his lawsuit, and this occurred at least 19 months after the date of a medical emergency that resulted in his son's brain damage. Defendant contends that "considering [plaintiff's] father ended up in a medical malpractice attorney's office, clearly, he had a suspicion of wrongdoing in advance thereof[,]" and "clearly the [plaintiff's] father developed a suspicion of wrongdoing long before litigation ensued" and "long before [plaintiff's] father consulted with a lawyer . . . ." But there is no evidence that plaintiff suspected wrongdoing "long before litigation ensued," and he alleges that he did not.

Defendant contends, however, and the trial court apparently agreed, that plaintiff was obliged to allege facts showing his discovery, 19 months after the physical injury, that the injury may have been caused by wrongdoing "was not a failure to investigate or act diligently," and plaintiff did not do so. Defendant cites *Fox*, *supra*, 35 Cal.4th 797, a products liability case involving a defendant's demurrer on statute of limitations grounds. There, the Supreme Court concluded: "Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff ***who suspects that an injury has been wrongfully caused*** must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts

---

plaintiff admitted that, shortly after his daughter's suicide in 1985 by overdose of prescription drugs, including Halcion, he had formed a belief that someone did something wrong to his daughter that caused her to take her own life and he had begun to contemplate bringing an action for wrongful death, but did not do so until 1991, when he read accounts in the news media of Halcion's dangerous propensities. (*Norgart*, *supra*, 21 Cal.4th at pp. 390, 405-406, 408.)

supporting the cause of action within the applicable statute of limitations period." (*Id.* at p. 808, boldface and italics added.)

But the *Fox* formulation does not justify the sustaining of defendant's demurrer in this case, because *Fox*'s direction that a plaintiff must conduct (and plead) a reasonable investigation is explicitly premised upon a plaintiff "who suspects that an injury has been wrongfully caused . . . ." (*Fox*, *supra*, 35 Cal.4th at p. 808.) *Fox* explained that plaintiffs "are required to conduct a reasonable investigation *after becoming aware of an injury*" (*ibid.*, italics added), and noted that "injury" means " 'both "a person's physical condition *and* its 'negligent cause.' " ' " (*Ibid.*, fn. 2.) In *Fox*, there was no question that the plaintiff suspected her injury was wrongfully caused, as she promptly sued her doctor and hospitals for malpractice—the question in *Fox* was whether the plaintiff should have suspected a different type of wrongdoing (products liability) by a different defendant.[2]

Here, by contrast, plaintiff alleges, in effect, that he did *not* suspect wrongdoing until he consulted an attorney—and he filed his claim promptly thereafter. While he

---

[2] *Fox* reiterated the principle established in *Jolly* and *Norgart*: in determining when the statute of limitations starts to run, "we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (*Fox*, *supra*, 35 Cal.4th at p. 807.) In *Fox*, there was an ongoing medical malpractice lawsuit, and during discovery the plaintiff found out that her injury may have been caused by the malfunctioning of a device used to staple her small intestine during surgery. In that context, the court held that "under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Id.* at p. 803.) Thus the accrual of the plaintiff's products liability cause of action was delayed, "even when a related medical malpractice claim has already accrued, unless the plaintiff has reason to suspect that his or her injury resulted from a defective product." (*Id.* at p. 813.) *Fox* again affirmed that "ignorance of the identity of the defendant does not delay accrual of a cause of action, but . . . ignorance of a generic element of the cause of action does." (*Ibid.*)

did not allege "facts" showing the inability to have made earlier discovery despite reasonable diligence, he *did* allege the *precondition* for that requirement—that he had no reason to suspect wrongdoing until he met with an attorney and that he simply wanted to know "why his child was in the condition in which the infant Plaintiff is"—a reason that does not compel us to infer he suspected wrongdoing. Thus plaintiff, at least for pleading purposes, does not come within *Fox*'s directive that "in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff ***who suspects that an injury has been wrongfully caused*** must conduct a reasonable investigation of all potential causes of that injury." (*Fox*, *supra*, 35 Cal.4th at p. 808, boldface and italics added.) It may be that discovery will produce evidence contradicting defendant's claim he did not suspect wrongdoing earlier, or suggesting that he should have done so. But without such evidence, the court cannot simply reject his allegations.

Wozniak v. Peninsula Hospital (1969) 1 Cal.App.3d 716 (*Wozniak*) illustrates the discovery rule under circumstances closely parallel to those in this case. While *Wozniak* predates *Jolly*'s elaboration of the "suspicion of wrongdoing" standard in determining "what constitutes sufficient knowledge to start the statute running" (*Jolly*, *supra*, 44 Cal.3d at p. 1109), *Jolly* did not change the discovery rule, namely, that "the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause." (*Ibid.*)

Wozniak, like this case, involved a claim by a child against a public entity, with the trial court finding on summary judgment that the claim was not timely, and the court of appeal reversing. In *Wozniak*, the otherwise healthy minor plaintiff had surgery to correct a crossed eye, and suffered cardiac arrest, resulting in extensive brain and nerve damage, during the surgery. (*Wozniak*, *supra*, 1 Cal.App.3d at p. 719.) Almost seven months later, in March 1966, a nurse engaged to give therapy treatments to the child's legs told her parents that the child's legs might not be in the condition they were in if the defendant hospital had given the child passive physical therapy earlier. (*Id.* at p. 720.) Eight months after the nurse's comments, in November 1966,

the parents consulted a lawyer about a bill they had received from the hospital, "and were informed of the possibility that they had a claim for negligence . . . ." (*Ibid.*) They filed a claim with the hospital a week later, but the hospital took no action, and plaintiff filed suit.

The hospital sought summary judgment, contending the action accrued in March of 1966, when the nurse therapist informed the parents that the hospital was negligent in its failure to give therapy, and the claim was filed in December 1966, well past the then-100-day deadline for claims presentation. The trial court agreed, concluding the parents reasonably should have known that a cause of action existed in March 1966. But the court of appeal held this was error, and the question when the cause of action accrued should be determined by the trier of fact. (*Wozniak*, *supra*, 1 Cal.App.3d at pp. 722, 726.) With respect to the nurse-therapist's statements, the court found that reasonable persons might believe the parents should have been alerted then, but it would be just as reasonable to place no credence in the statements, as they did not relate to the cause of the child's brain and nerve injury, an issue "far beyond the sphere of the nurse-therapist's knowledge." (*Id.* at p. 724.)

The court continued: "It is true that the parents were aware that after the operation their child's physical and mental condition was abnormal, but the record does not connect the defects with the operation or lack of hospital care. Whether the nerve and brain damage was the result of some condition pre-existing the operation or whether they reasonably should have believed that the condition was the result of some negligence is a question of fact." (*Wozniak*, *supra*, 1 Cal.App.3d at pp. 724-725.) *Wozniak* elaborated: "There is nothing in the record to indicate that the [parents] were ever informed by the hospital or the physicians as to the cause of the brain and nerve injury or of the end result to be anticipated. The question of when there has been a belated discovery of the cause of action, especially in malpractice cases, is essentially a question of fact. The facts and circumstances of the medical treatment rendered a patient are within the exclusive knowledge of the hospital and the attending physicians. It is difficult to understand how an injured person could discover

the cause of the injury until he has obtained that information. [Citations.] It is only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law. [Citations.]" (*Id.* at p. 725.)

The Supreme Court reached a similar conclusion in *Whitfield v. Roth* (1974) 10 Cal.3d 874, 885-888 (*Whitfield*), describing *Wozniak* at length, "not merely because it is germane to the question before us but particularly because it is so close on its facts and in its application of relevant principles as to constitute highly persuasive authority." (*Whitfield*, at p. 885; *id.* at pp. 887-888 [observing that "the [parents in *Wozniak*] knew that a cardiac arrest followed by severe damage was an abnormal reaction to the crossed-eye operation, but did not know what caused this result, or if it had been caused by the negligence of the hospital"].)[3]

In short, "resolution of the statute of limitations issue is normally a question of fact . . . ." (*Jolly, supra*, 44 Cal.3d at p. 1112.) Sometimes, the issue can be decided on summary judgment, if "the uncontradicted facts established through discovery are susceptible of only one legitimate inference . . . ." (*Ibid.*) But it is not often that the point can be decided on a demurrer, particularly in medical malpractice cases. (See *Wozniak, supra*, 1 Cal.App.3d at p. 725) ["The question of when there has been a

---

[3] *Whitfield* was also a medical malpractice case involving a minor and a county hospital as a defendant, and reversed a judgment of nonsuit that had been entered on the ground of untimeliness of the claim. In *Whitfield*, the court concluded the mother did not discover the negligent cause of her daughter's injury until she examined the medical records, and that she "was reasonably diligent in pursuing her suspicion of possible negligence . . . ." (*Whitfield, supra*, 10 Cal.3d at p. 889.) The court contrasted other cases the defendant county had cited to support its claim that the mother was not reasonably diligent in discovering the negligent cause of the plaintiff's injury, saying: "Neither case involves a minor or the determination of the accrual of a medical malpractice action in the context of the claims statutes. In both cases the plaintiff, *despite a suspicion of negligence by doctors involved in their treatment*, failed to take any action for a year. In the case at bench, [the mother] contacted an attorney within a month of becoming suspicious that there might be negligence involved." (*Id.* at p. 889, fn. 19, italics added.)

belated discovery of the cause of action, especially in malpractice cases, is essentially a question of fact."].)

This is not a case where the complaint shows on its face that plaintiff's father suspected or should have suspected, on the date of his son's emergency surgery, that his son's brain damage was caused by medical negligence rather than by the natural progress of the medical condition that brought him to the emergency room. And on a demurrer, we must assume to be true plaintiff's allegation that it was not until plaintiff's father conferred with an attorney that he "discovered (or could have discovered or should have discovered) for the first time, facts suggesting that defendant . . . had been negligent in its care and treatment of the minor Plaintiff . . . ." It may be that the evidence will show the contrary, but that is for the trier of fact to decide.

We cannot end without mention of *Munoz v. State of California* (1995) 33 Cal.App.4th 1767 (*Munoz*), on which defendant has relied, both in the trial court and here, for the proposition that plaintiff's father knew everything he needed to know to file a government claim on the date the incident occurred. Defendant's reliance is mistaken, as *Munoz* does not concern the accrual of a cause of action or any claim of delayed discovery of an injury. In *Munoz*, there was no dispute over whether the wrongful death action accrued on the date of death; the issue was whether plaintiff's late filing was the result of excusable neglect. The court found it was not, and observed in the course of its discussion that the Government Claims Act does not require "specificity with regard to the nature of the injury suffered . . . ." (*Munoz*, at pp. 1784-1785.) Defendant seizes on the court's language as establishing, for this case, that once plaintiff suffered permanent brain damage, the cause of action began to accrue. *Munoz* stands for nothing of the sort. While specificity as to the nature of the injury is not required to file a claim, nothing in *Munoz* suggests that a claim must (or could) be filed before a suspicion that the injury was the result of wrongdoing has arisen.

DISPOSITION

The judgment of dismissal is reversed and the cause is remanded to the trial court with directions to reinstate the third amended complaint against defendant Antelope Valley Hospital District. Angel Martinez shall recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

FLIER, ACTING P. J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.